No. 13941

United States Court of Appeals

for the Ninth Circuit

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 So. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

MARK P. ROBINSON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22,595 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES WILLIAM AFFELDT, JR.,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act.]

The grand jury charges:

Defendant Charles William Affeldt, Jr., a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 81, said board being then and there duly created and acting, under the Selective Service System established by said act, in Ventura County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 13, 1952, in Los Angeles County, California, within the Central Division of the Southern Dis-

trict of California; and on or about said date in Los Angeles County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed December 3, 1952. [2*]

United States District Court for the Southern District of California, Central Division

No. 22,595-Cr. Indictment
[1 Count—for violation of 50 U.S.C. § 462.]

UNITED STATES OF AMERICA,

vs.

CHARLES WM. AFFELDT, JR.

JUDGMENT AND COMMITMENT

On this 7th day of April, 1953, came the attorney for the government and the defendant appeared in

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

person and with his attorney, J. B. Tietz, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on November 13, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 4 p.m. on Thursday, April 9, 1953, and that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 4 p.m. on April 9, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed April 7, 1953. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Charles William Affeldt, Jr., resides at Rt. 3, 201 Conejo Rd., Ojai, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462—Selective Service Act, 1948.

On April 7, 1953, after a verdict of Guilty, the court sentenced the appellant to four years confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal do hereby appeal

to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed April 7, 1953. [9]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are herby designated as the record which is material to the proper consideration of the Appeal filed by Charles William Affeldt, Jr. in the above-entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter.)
3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals as provided by Rule 75 (O) R.C.P. and Rule 11 of the U.S.C.A. for the Ninth Circuit.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed June 29, 1953. [11]

In the United States District Court, Southern District of California, Central Division

No. 22,595-Crim.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES WILLIAM AFFELDT, JR.,
Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,
United States Attorney, By

MANUEL REAL,
Asst. United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

Thursday, March 12, 1953, 1:30 P.M.

The Court: No. 22,595, United States vs. Affeldt.

Mr. Tietz: Defendant is ready, your Honor.

Mr. Real: Ready for the Government, your Honor.

The Court: The defendant is present?

The Defendant: Yes, sir.

The Court: It appears that on January 5, 1953,

there was approved and filed a waiver of trial by jury and waiver of special findings of fact, pursuant to Rule 23(a). I assume the defendant still desires to proceed without a jury?

Mr. Tietz: Yes, your Honor.

The Court: Very well. You may proceed, Mr. Real.

Mr. Real: The Government will waive its opening statement.

Your Honor, pursuant to a stipulation marked Government's Exhibit 1-A:

"It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Charles William Affeldt, Jr., Defendant, in the above-entitled matter, through their respective counsel, as follows:

"That it be deemed that the Clerk of Local Board No. 81 was called, sworn and testified that:

"1. She is a clerk employed by the Selective [3*] Service System of the United States Government.

"3. As Clerk of Local Board No. 81, she is legal custodian of the original Selective Service file of Charles William Affeldt, Jr.

"4. The Selective Service file of Charles William Affeldt, Jr. is a record kept in the normal course of business by Local Board No. 81, and it is the normal course of Local Board No. 81's business to keep such records.

"It Is Further Stipulated that a photostatic copy of the original Selective Service file of Charles William Affeldt, Jr., marked 'Government's Exhibit 1' for identification, is a true and accurate

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

copy of the contents of the original Selective Service file on Charles William Affeldt, Jr.

"It Is Further Stipulated that a photostatic copy of the Selective Service file of Charles William Affeldt, Jr., marked 'Government's Exhibit 1' for identification, may be introduced in evidence in lieu of the original Selective Service file of Charles William Affeldt, Jr.

"Dated this 9th day of March, 1953."

Signed by myself on the part of the Government, by Mr. Tietz as attorney for the defendant, and by the defendant, your Honor. [4]

Pursuant to the stipulation we move that the photostatic copy of the Selective Service file of Charles William Affeldt, Jr. be introduced into evidence at this time.

The Court: Is there objection?

Mr. Tietz: No objection.

The Court: The file will be received into evidence as Exhibit 1, and the stipulation just read into the record will be received as Exhibit 1-A.

The Clerk: Government's Exhibit 1 received in evidence and Government's Exhibit 1-A received in evidence.

Mr. Real: Pursuant to a stipulation between counsel for the defendant and myself, your Honor, I have here a three-page document entitled Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed.

It is stipulated that this is an exact copy, except for the blank spaces, that the defendant received

pursuant to his request for a hearing before the hearing officer. May it be received in evidence as Government's Exhibit 2?

The Court: Do you offer so to stipulate?

Mr. Tietz: Yes, your Honor.

The Court: As I understand the stipulation it is this: That the document now offered is a true copy, except for dates and names, of a Notice and Instructions sent by the hearing officer and received by this defendant 10 or more days prior [5] to the date fixed for the hearing before the hearing officer.

Mr. Tietz: Yes, your Honor.

The Court: Very well. It will be received in evidence as Exhibit 2.

Mr. Real: With that evidence the Government rests its case.

The Court: The defense.

Mr. Tietz: At this time the defendant will advance six points for consideration of the court for a judgment of acquittal. The first one is based on the fact that the file—I believe it will be page 11—in any event, it is the part of the classification questionnaire, the back sheet of it has the minutes of actions.

The Court: The minutes appear to be on pages 11, 12 and 13.

Mr. Tietz: Yes. This was a rather long one. In any event, the initial matter that I wish to invite the court's attention to will be on page 11, and that is the fact, as shown on this page, that on October 23, 1951, the III-A deferred classification that this defendant had been enjoying was taken away and

a higher classification, namely, I-O was given; and there is nothing in the file to support a change from a good classification to one not so good.

The cases that help on that point are the Rusk case and the Stanziali case. Those cases cover two points: One, when [6] a local board reclassifies a registrant without a basis of fact, that is, anew, it is acting beyond its jurisdiction; and they also say that when it does it without a basis of fact, it is acting arbitrarily.

And then there is still a third point that I think I should mention at this time in connection with that, that the regulations mandatorily require that when a registrant is considered for a classification he be considered for the classification first less, and a III-A classification is lower than a I-O classification.

So that all comes back to the point I have argued a number of times, your Honor, and I won't go into at length, that when a registrant meets the qualifications of a lower classification, he must be given that regardless of what the board would like to do.

(Argument omitted from transcript upon request of counsel.)

Now, your Honor, we come to our second point. It is entirely separate from this other point, although it is based on the same facts. And this next point I am making will be shown to exist in the file by your Honor looking at page 33, which is the minute memorandum of October 23, 1951, showing that the reason given by the board itself for making

this change from a III-A to a I-O was because of something that they term a "memorandum, dated October 16, 1951." [7]

Now, my complaint on that procedure and my justification for labeling it a denial of due process is based on this: The Selective Service System has a considerable number of inter-departmental memos, some of them printed with as much care and in all appearances similar to regulations, those that they call local board memoranda; others are merely offset printed, others are mimeographed. They go by various names—SHQ's form, state headquarters memorandum, Selective Service News, which is a magazine, and they contain in most instances directions to the local board.

Now, when those directions cover such subjects as the size of the paper or the color of the ink, no registrant probably would have a right to object. But when those directions influence the local board to act contrary to the regulations published in the Federal Register and available to all lawyers—these others you can't get—I might state here very briefly I tried to get them by sending coupons and money and charge accounts to the superintendent of documents. He does not have them. I have asked the National Headquarters, the State Headquarters, and I do not doubt that their answer is correct—they are short of paper and short of funds. So that I can't get them by buying or begging for them. I can see them occasionally by going to a local board and in that way I have a little chance,

but the ordinary registrant and the ordinary lawyer does not even [8] know of their existence.

That practice is condemned in the case of Barriel, a case that arose in this District. The citation for the Barriel case is 101 Fed. Supp. 348; and there it was held that when one of these interdepartmental memos advised a board to do something to the prejudice of registrant, contrary to the regulations—in this case, as I pointed out in my previous point, the regulations say he should have the III-A—that that is a denial of due process. In that particular instance the petitioner was taken out of the Marine Corps, which is a rather serious step, of course, the judge is reluctant to take.

My next point is that, although the registrant, now the defendant, had considerable evidence in his file that he was a minister—enough to be persuasive to many people and perhaps to all people except this particular board—he was not given the IV-D classification which is in the ranking that is set forth in the regulations, a lower or a better, to use another term, classification than even the III-D.

The Court: Let us not worry about those points. It is my view all of that has been superseded. You may state them in the record, but do not spend any time on them because defendant here was later classified by the appeal board I-O. That in my view, superseded everything that had been done before. [9]

You may state any points you have. I am referring to any discretion that was exercised before. I am not referring to any omissions of administrative due process.

Mr. Tietz: Well, your Honor, I would want hastily to offer the matters that are in the file, the evidence that he presented. I will just really recite them.

The Court: It is the matter of argument and we are just taking time. You make your point on the record. To my view the point has no materiality, Mr. Tietz. I am just saying that to save time.

Mr. Tietz: Would your Honor listen to this part of that point: That the summary of the personal appearance hearing shows a misconception of the law and, therefore, had an adverse influence on the appeal board decision? I would like to go into that if the court would consider it something that might influence your Honor's decision.

The Court: The appeal board presumably knew the law, even if the Local Board did not.

Mr. Tietz: Well, there are cases that say that when something might influence them, that it should not be in the record.

Then I will go to my next point, that the appeal board changed the I-O classification to a I-A, and that is the February 19, 1952, entry shows no reason and that there was no reason in fact in the file to justify it. [10]

The Court: Did the appeal board make the change or the local board make the change first?

Mr. Tietz: I had better refresh my memory.

The Court: In December of 1951 the appeal board—December 11, 1951, according to page 11, the minutes on page 11 of Exhibit 1, the file here,

the defendant was classified I-O by the appeal board.

On February 19, 1952, he was classified I-A, apparently by the Local Board.

February 27th he requested a personal appearance which was granted, and it was held on March 4th; and on March 4th, classified I-A.

Form 110 was then mailed on March 4th and appeal taken on March 13th, all in 1952.

March 18th, final review by the board.

April 23rd, the appeal board reviewed registrant's file and determined that registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of Section 1626.25.

So that we have, apparently after the Local Board had classified the defendant I-O on October 23, 1951, a grant of registrant a personal appearance on November 6, 1951, and had continued the I-O classification on November 6, 1951.

And again, on November 13, 1951, when there was an appeal, [11] the registrant was classified in I-O by the appeal board.

Then on February 19, 1952, the Local Board reclassified the registrant I-A, and upon appeal they reclassified him the same classification following a personal appearance, and the appeal board in effect confirmed by classifying him I-A.

I take it your point is that there was no basis of fact for the change in classifications.

Mr. Tietz: Any sufficient basis in fact.

The Court: From I-O to I-A.

Is there any reason appearing in the file for this action?

Mr. Tietz: Yes, there are a number of letters that came in that could be used as a reason. And my argument will be that they are insufficient.

The Court: Will you cite me to those letters?

Mr. Tietz: I am not prepared to.

The Court: You proceed, then, on your motion. I have that point.

Mr. Tietz: In the very end he got the full appellate procedure that is accorded the conscientious objector in that he had the hearing officer hearing and had the advisory letter placed in his file after having been sent to the appeal board, the advisory letter from the Attorney General.

Now, we submit that there was a denial of due process there in that the Attorney General made an illegal conclusion and an illegal argument to the appeal board, in that he [12] confused and failed to make a distinction between war and the use of force. The Attorney General advised the appeal board that, because this individual was not wholly averse to the use of force, he therefore was not a conscientious objector, was not one who objected to participation in war. That matter, I believe, has been argued to your Honor, not by myself but in other matters, so that your Honor is generally familiar with that argument.

(Argument omitted from transcript.)

My sixth point that I wish to submit to the court's attention is a bit unique in that we have not had it before.

The court will notice by looking at the Stipulation that was entered into that something was Xed out, and that part that was Xed out is the part that this defendant was a registrant of this board. If this defendant is not a registrant of this board, it had no jurisdiction over him and he is improperly before the court.

The Court: Why isn't he a registrant?

Mr. Tietz: He never signed the registration card. There might be an argument about waiver and all, but I would like to reply when that argument is made.

The Court: Did he refuse to register?

Mr. Tietz: No, sir; just isn't registered. That is why we Xed that out. There is something in the file that comments on that. He never signed a registration card. [13]

I do not particularly like to make a defense based on some little inadvertence, but I think every defendant is entitled to every defense, especially in a Selective Service case where the field is so narrow. In other words, if I can procure from him even on such a technicality an opportunity to go through the Selective Service process again, I think he can profit by it and would come out with a classification more in accord with what his evidence is.

The Court: You are pointing to the first page of Government's Exhibit 1, the reverse side of the photostatic copy of the reverse side of the registration card where the signature of registrant is absent, is that it?

Mr. Tietz: That is the registration card. And

then there is some inter-departmental correspondence in which that is taken up, so that it was recognized that this particular defendant had not technically become a registrant of the board.

The Court: Anything further?

Mr. Tietz: No.

The Court: The motion for a judgment of acquittal will be denied, with the privilege, of course, as the rules provide, to renew the motion or to make another motion to like effect upon the close of all the evidence. I will hear the defense evidence.

Mr. Tietz: The defendant will take the witness stand. [14]

Defendant's Case in Chief

CHARLES WILLIAM AFFELDT, JR.

the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Charles William Affeldt.

Direct Examination

By Mr. Tietz:

Q. I am going to hand you two sheets of paper as soon as the United States Attorney is through perusing them and ask you if you can identify them. Can you tell us——

Mr. Real: I think it is proper to raise the objection now to the exhibits before the defendant, in that they cover matter which is matter denied

(Testimony of Charles William Affeldt, Jr.)

him to use in a record of this sort by the Cox case, as to determine as to whether he is or is not a minister, by people who knew him outside.

The Court: I do not know what the documents are. The witness has not answered the question pending. Objection overruled. Do you know what the documents are?

The Witness: Yes, I do.

The Court: What are they?

The Witness: They are documents submitted to Nathan O. Freedman, my hearing officer. They are affidavits, in effect, that were signed by persons known to me who testify that I was a minister. They are parties related to my case [15] which I submitted to Nathan O. Freedman at the time of my hearing.

The Court: At the time of what hearing?

The Witness: My appearance before him.

The Court: On your last appeal?

The Witness: At my last appeal. I only had a hearing once before a hearing officer.

Mr. Tietz: I ask that they be marked for identification as Defendant's Exhibits A and B.

The Court: They will be so marked.

Q. (By Mr. Tietz): You have stated that you showed them or offered them to Mr. Freedman at the time of the hearing you had before him as the hearing officer of the Department of Justice?

A. Yes. I should say at this time those are copies of the ones I gave to him.

Q. Are they identical copies?

(Testimony of Charles William Affeldt, Jr.)

A. They are identical copies, except the ones I gave Mr. Freedman were notarized by a public notary.

Q. Have you examined your Selective Service file? A. Yes, I have.

Q. Have you found the originals of these duplicates in the file? A. No, I have not.

Q. When you gave them to Mr. Freedman, you gave them [16] to him for what purpose or with what understanding?

A. I gave them to him so that he would—as additional evidence that I was a minister and also a conscientious objector. I thought that perhaps it would serve to refute any adverse testimony he had concerning me.

Q. When you were before this hearing officer on this single occasion that you were before him did you attempt to give him any evidence or argument on the difference between the pacifist and the Jehovah Witness type of conscientious objector?

A. Yes, I did.

Q. What occurred?

A. He refused that evidence. He said, "I have read everything of Jehovah's Witnesses. I don't need to read anything more." And he didn't even look at what I had. He just cut me off.

Q. Did he say anything about "20 clients," some expression like that?

A. Yes, he did. He said he didn't have time to go over my case and take up so much time because

(Testimony of Charles William Affeldt, Jr.)
he had 20 or so more clients he had to see that same day.

Q. Now I am going to direct your attention to another occasion, March the 4, 1952, and ask you if you remember where you were then?

A. March 20? [17]

Q. March 4, 1952. Well, I will add to that question: Isn't it a fact that you were before the Local Board for your personal appearance hearing on that date?

A. Yes, sir. I can't remember the exact date but I was at about that time.

Q. Have you seen the summary which is page 59 of this file? Page 59 of the Exhibit I is the summary or purports to be the summary of your personal appearance hearing.

A. Yes, I have read my entire file. I have read it.

Mr. Tietz: Called "Minutes of Local Board Meeting": your Honor.

Q. It states "Registrant appeared before the Board requesting a IV-D classification. After being questioned he states he is not an ordained minister."

What took place at the board hearing with respect to that particular thing?

A. Well, they asked me whether I had ever attended a theological seminary or a school, a divinity school. I replied that, while I had not attended a college to prepare myself for the ministry, I had studied at congregational meetings of Jehovah's

(Testimony of Charles William Affeldt, Jr.)

Witnesses, and one of the classes is the Theocratic Ministry class for Jehovah's Witnesses, where they are instructed for the ministry.

And they stated that because I had not gone to college [18] and received a diploma, I could not be an ordained minister.

And then I pointed out the regulations provide that a regular minister of religion whose customary vocation was ministering should be exempted or given a IV-D classification.

Q. Were you at that time an ordained minister?

A. All Jehovah's Witnesses consider themselves ordained when they are baptized or when they receive water immersion.

Q. Did you make that statement or submit any other evidence to your Local Board at that time?

A. I made that statement to my Local Board at that time. I can't recall whether I gave him any written information at that time, although I know in my file I have submitted that information.

Q. And you have submitted to them other information showing the meetings you have held, you have conducted, leaflets, handbills with your name imprinted thereon, the subject of your sermons, and so on? A. Yes, sir.

Mr. Tietz: You may cross-examine.

Cross-Examination

By Mr. Real:

Q. Mr. Affeldt, subsequent to your personal appearance hearing did you submit some new evidence

(Testimony of Charles William Affeldt, Jr.)
to the appeal board in writing?

A. Yes, I did. That was after, shortly afterward I [19] obtained that permission from the Local Board, which they granted, I came in a few days later, at the time I gave my local file to the appeal board and submitted that evidence at that time.

Q. In that evidence did you set forth all that you just testified to as to your beliefs as to why Jehovah's Witnesses are ordained ministers?

A. Well, I wouldn't say "all." I submitted additional evidence. I had already submitted much evidence, both oral and written evidence, to the board.

Q. No written evidence was refused you, is that correct? A. That is correct.

Mr. Real: That is all, your Honor.

Mr. Tietz: That is all from this witness.

The Court: You may step down.

Mr. Tietz: Mr. Real, may we have some kind of a stipulation that we will make about the FBI reports?

Mr. Real: Yes. If Mr. Carson will take the stand, I will make the stipulation.

CRAWFORD H. CARSON

called as a witness, being first sworn, was examined and testified as follows.

The Clerk: Will you state your name, please?

The Witness: Crawford H. Carson. [20]

(Testimony of Crawford H. Carson.)

Mr. Tietz: What can we stipulate to, Mr. Real, with respect to the FBI report?

Mr. Real: Your Honor, prior to our stipulation, I think that these documents should be marked for identification and then the foundation laid to our stipulation. We will stipulate as to the process your Honor indicated this morning, which seems to carry on the argument.

The Court: Proceed.

Mr. Real: May it be stipulated that, one, Defendant's Exhibits—and Mr. Carson has four——

The Court: Is the Government now offering for stipulation?

Mr. Real: No, I am not.

The Court: Are you offering to make a stipulation?

Mr. Real: I will as soon as Mr. Tietz lays his foundation, your Honor. My stipulation does not cover that.

The Court: What foundation do you wish laid?

Mr. Real: As to the identification of those particular documents, and we will proceed from there.

Examination

By the Court:

Q. What is your occupation, Mr. Carson?

A. I am special agent in charge of the Federal Bureau of Investigation, Los Angeles Division.

Q. Do you have with you the copies of the investigative report or reports of the Federal Bureau of Investigation [21] respecting the conscientious

(Testimony of Crawford H. Carson.)

objector claims of the defendant here, Charles William Affeldt, Jr.? A. I do, your Honor.

Q. Does that report consist of one or more parts? A. Four reports, your Honor.

Q. For the purposes of identification will you give the date of each report?

A. Yes, sir. One report is dated July 2nd, 1952; another report has the same date, July 2nd, 1952.

Q. Can you otherwise identify them so we may distinguish them, so we can differentiate one from the other? Is one so many pages and the other so few?

A. I would not know, your Honor, without breaking the seal and examining them.

Q. Very well, proceed.

A. And the third is dated July 4, 1952; and the last one is dated July 9, 1952.

The Court: Very well. Will you hand to the clerk the first report which you identify as being dated July 2nd, 1952? You may deliver those reports, under seal, if so advised.

Mr. Clerk, you will mark that report Exhibit C for identification, Defendant's Exhibit C for identification.

The Clerk: Yes, your Honor, C for identification.

The Court: The other report dated July 2, 1952, will [22] be marked Defendant's Exhibit D for identification; the report of July 4, 1952, will be marked Defendant's Exhibit E for identification.

What is the date of the last?

(Testimony of Crawford H. Carson.)

The Witness: July 9th, 1952.

The Court: That will be marked Defendant's Exhibit F for identification. Have you delivered those to the clerk, under seal, Mr. Carson?

The Witness: Yes, your Honor.

The Court: Very well. They will remain under seal pending in camera examination by the court.

Does the Government have a stipulation to offer?

Mr. Real: Yes, your Honor. The Government will offer the stipulation.

May it be stipulated that Defendant's Exhibits C, D, E, and F for identification are true and accurate copies of the complete investigative reports made by the Federal Bureau of Investigation of the conscientious objector claims of the defendant, Charles William Affeldt, Jr.?

Two. Defendant's Exhibits C, D, E, and F were forwarded by the representative of the Federal Bureau of Investigation, so designated, for the purpose, to the office of the United States Attorney?

Three. Defendant's Exhibits C, D, E, and F were forwarded by the office of the United States Attorney to the Hearing [23] Officer designated by the Department of Justice to hear the conscientious objector claims of the defendant, Charles William Affeldt, Jr., as provided in Section 6(j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

Four. Defendant's Exhibits C, D, E, and F are the investigative reports that were in the possession

of the Hearing Officer prior to the hearing held to determine the validity of the conscientious objector claims of the defendant, Charles William Affeldt, Jr., and were used and referred to by the Hearing Officer in the recommendation he prepared and sent to the Department of Justice concerning conscientious objector claims of the defendant, Charles William Affeldt, Jr., as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

The Court: Do you accept the stipulation?

Mr. Tietz: We accept the stipulation. We would like to have the opportunity to examine the investigative reports of the Federal Bureau of Investigation.

Mr. Real: Your Honor, that is objected to under the privilege of Executive Order 3229.

The Court: That motion will be denied. The defendant wishes to offer the documents in evidence. The court will make an in camera examination of them.

Mr. Tietz: Yes. That is our next request. [24]

Mr. Real: Your Honor, to that request the Government will object upon the grounds there has been no foundation laid as to the relevancy and materiality of these records in this particular case, since there was no showing of a request by the defendant or that he even—well, there is no foundation at all as to the reports by the defendant, as to a request by him as required under the notice of hearing.

Mr. Tietz: First, we would like to be in a position to avail ourselves of the Nugent case and the possible affirmance by the Supreme Court.

And second, I have three other points that I would like to submit to the court.

The Court: Very well. Have you any other questions of Mr. Carson?

Mr. Tietz: None.

Mr. Real: None by the Government, your Honor.

The Court: You may step down, Mr. Carson.

Mr. Carson: Thank you, your Honor.

The Court: I take it that the defendant is not offering Exhibits C, D, E, and F for the purpose of showing that the hearing officer withheld any unfavorable information from this defendant.

Mr. Tietz: Yes, that is one of the points that, regardless of any request, it must be offered to him. I merely state it.

The Court: You are relying upon the Nugent case in that [25] regard?

Mr. Tietz: Yes.

The Court: When you referred to the Nugent case do you have that citation so the record will correctly reflect it?

Mr. Tietz: 200.

The Court: 200 Fed. 2d, 46. Has a writ of certiorari ever been granted in that case?

Mr. Tietz: I don't think so.

(Argument omitted from transcript.)

The next point we wish to make in connection with the FBI report is that the use of it—and, of course, the hearing officer's report and the Attorney General's letter show that it was used—vitiates all further proceedings because it is hearsay; that the

defendant has had no opportunity to exclude or confront and so on.

And the final point in connection with the FBI type of situation is this: It is a further denial of due process if it contains material adverse to the registrant. That is on the presumption that it is definitely, then, prejudicial to him.

Now to proceed with our other points, we, of course, first, wish all six of the points that were made at the close of the Government's case.

The Court: Let us dispose of this evidence now, first. Have you said all you wish to say in favor of your motion [26] that Defendant's Exhibits C, D, E, and F be received into evidence?

Mr. Tietz: Yes, sir.

The Court: Very well. Before ruling on it, the court will make an in camera examination of those documents.

We will take the afternoon recess at this time.

(Short recess.)

The Court: Has the Government stated its objection to the offer of Exhibits C, D, E, and F in evidence?

Mr. Real: Yes, your Honor. For the record, I will state it that there is no proper foundation laid in that these reports, at this point of the trial, are irrelevant and immaterial to the issues in this case.

The Court: Do you make any claim of privilege?

Mr. Real: Also the claim of privilege under 3229, your Honor. I think we made that prior.

The Court: It can always be waived. I do not

know but you may have concluded since then to waive it.

Mr. Real: No, your Honor, we have not.

The Court: Some of the questions that have been asked by Government counsel in some of these cases come perilously close to a waiver, in my opinion.

I have always contended, Mr. Tietz, in the reasoning of United States vs. Nugent, 200 Fed. 2d 46. But I no longer need to do so in view of the holding of the Court of Appeals [27] of this Circuit on February 24th last in Elder vs. United States of America. (202 F. 2d 465.) I believe you were counsel in that case.

Mr. Tietz: I think that is obiter, your Honor, but still it is an expression.

The Court: Yes. And it is such an elaborate treatment of the point as a point in the case.

Having considered the point as being in the case and then having decided it, it seems to me it would be a holding. In any event, I would follow it. I think the reasoning is much to be preferred, as well as the results are much to be preferred, to that in the Nugent.

As I view the matter, there is no question of constitutional due process involved at all. There is no question of even statutory due process. The statute directed the Department of Justice to make inquiry and hold a hearing, and the inquiry, in my view, would be what we call the FBI reports, Exhibits C, D, E, and F here.

In my view, there is nothing in the Constitution or in the statute that requires the Department of Justice, in making its advisory recommendation to

the appeal board, to disclose the results of its inquiry to anyone. But the Attorney General has seen fit to combine the inquiry with the hearing apparently and has directed that the results of the inquiry be turned over to the hearing officer for use by [28] the hearing officer and, in the exercise of his discretion, the Attorney General has set up what I will call some administrative machinery, giving rise to some administrative due process that, briefly, is set forth in Exhibit 2 here. It permits the registrant to request of the hearing officer a general statement, at least, as to the adverse evidence in the hearing officer's possession in order to give the registrant an opportunity to meet it.

Well, that administrative due process is not violated here. So we come down to whether or not these exhibits are relevant or material to any issue in the case for use by the defense, and the court finds that the exhibits are not relevant or material to any issue appearing in this case.

The exhibits will not be submitted for inspection by the defendant or his counsel by reason of the court's ruling and by reason of the fact that, in the opinion of the court, the public's interest in the preservation of the confidential character of these executive documents outweigh the possible evidentiary value of Exhibits C, D, E, and F for identification to the defense in this case.

Accordingly, the clerk will reseal Exhibits C, D, E, and F for identification and keep them in his custody, under seal, pending further order of the court.

The court will make the further order in this case, as has been made in other cases, that in the event of any appeal [29] in this case the clerk will, upon request of the defendant, consider Defendant's Exhibits C, D, E, and F as part of the record on appeal and will transmit the exhibits, under seal, to the Appellate Court for in camera examination by the Appellate Court in order for the court to examine the documents and determine whether or not this court erred in, one, withholding the documents from the inspection by the defendant and his counsel; and, two, by excluding them from evidence in the case.

It will be necessary to declare a recess. Pardon me.

Mr. Tietz: I might ask your Honor would we have 15 minutes. I have a matter I would like to bring to Judge Westover's attention and it would take perhaps that long. Mr. Real's presence will be required there, too.

The Court: Very well. Perhaps we may have to hold late in order to finish this Sterrett case this afternoon, but you may have the 15 minutes.

Court will recess for 15 minutes.

Mr. Real: Before you leave the bench, your Honor, may Mr. Carson be excused at this time? I do not think his presence will be necessary in the next case.

Mr. Tietz: That is correct.

The Court: Very well.

(Short recess.)

The Court: In the case on trial, gentlemen, is it [30] stipulated that the defendant Affeldt is present?

Mr. Tietz: So stipulated.

Mr. Real: So stipulated, your Honor.

Mr. Tietz: In connection with the renewal of my argument——

The Court: Now, just a moment. Has the defendant rested now?

Mr. Tietz: Yes, sir.

The Court: Is there any rebuttal?

Mr. Real: No rebuttal, your Honor, at this time.

The Court: Both sides rest. And the defendant, I take it, now renews his motion for judgment of acquittal?

Mr. Tietz: Yes, sir.

The Court: And upon the grounds previously stated.

Mr. Tietz: Other than the three FBI points that I stated before, that there has to be a disclosure whether or not there is a request before the hearing. I would like to discuss that for a few minutes.

(Argument omitted from transcript.)

Mr. Tietz: There are some points that have come up through the testimony of the defendant. One is that the summary of his personal appearance before the Local Board, which is page 59, is defective. They call it "Minutes of Local Board Meeting," but it, of course, means the same thing. Probably they term it "Minutes" because that is really what it is. [31] It is more of a minute action than it is a summary.

He has pointed out that there were things that he brought up during that personal appearance hearing that were not set forth in the minutes, or, as it should be called, summary, particularly about his ordination and particularly about his work.

(Further argument omitted.)

There is another point, too, that I should state, although I do not think your Honor will want me to do more than state it; and that is, that it shows that they used an illegal basis; they had misunderstanding of the regulations. They thought that only an ordained minister could qualify. In their last paragraph they say: Since the registrant is not an ordained minister the board members felt that a IV-D classification was not warranted.

I have only this comment to make on that.

(Argument omitted from transcript.)

Now I would like to go on—I have one thing to say, though, about a point that I made in my first motion, just an additional brief statement, and that is that he was not a registrant of the board. It may seem that he conferred jurisdiction, and my argument is—and it is just really a statement—that an individual can't confer jurisdiction on a local draft board any more than individuals can confer jurisdition on a court. [32]

(Argument omitted.)

Now, my other new point that came out from the evidence is: At the hearing officer hearing, irrespective of anything to do with the FBI investiga-

tive report, about certain aspects that were a denial of due process. The fact that the hearing officer, undisputedly, refused to accept evidence of the differences between a pacifist and J. W. type of conscientious objector is one point. The fact that the hearing officer refused to accept some written evidence, two affidavits, is another point.

(Argument omitted.)

The Court: I notice that Defendant's Exhibits A and B for identification, the documents which the defendant states he offered to the hearing officer and which were refused, are not in evidence. Do you wish to offer them in evidence?

Mr. Tietz: Oh, yes, I thought we had.

Mr. Real: Your Honor, we will object to them on the grounds that they are irrelevant and immaterial to this case. They are hearsay and they are not the best evidence, your Honor, since the defendant on the stand testified that he gave the originals, notarized copies, to the hearing officer and there has been no showing that those are not available.

Mr. Tietz: The regulation requires that all written evidence submitted be put in the file, and the file speaks for itself, but those are not there. [33]

The Court: The regulation does not require the hearing officer to put evidence submitted to him in the file.

Mr. Tietz: It does not specifically say who, and it certainly does not name him, but he is part of this procedure. They were given to him for the one purpose.

The Court: If the regulation required that all evidence submitted to the hearing officer be put in the file, then the rule of the Nugent case would be clear, would it not, because the FBI report is part of the evidence under the machinery set up by the Attorney General before the hearing officer.

Mr. Tietz: There, of course, is a distinction. The FBI is protected by the Attorney General's order, perhaps, where there is no claim of protection here.

The Court: I should not think it would be protected if the regulations provide any evidence that went to the hearing officer should be placed in the registrant's file. But I do not understand the regulations require it. It is only the evidence which is presented to a local board, as I understand it, which must go into the file.

Is that the Government's understanding?

Mr. Real: That is my understanding.

Mr. Tietz: Those two exhibits should be in as showing that this defendant did not have a fair hearing before the hearing officer because they were not considered by the [34] Attorney General who was to pass on what the hearing officer had considered.

Mr. Real: I submit, your Honor, that those exhibits are questions involving the ministerial claim which the Attorney General has no jurisdiction to rule upon.

The Court: They are offered here as evidence of material which was offered to the hearing officer and refused by the hearing officer. The question is upon the admissibility. I think your objection is

technically good, that these are not the originals. Do you wish to stand upon that?

Mr. Real: We will stand on the objection that they are irrelevant and immaterial, and also that they are not the best evidence, your Honor.

The Court: Did the defendant testify that these were the documents which were offered?

Mr. Tietz: That those were true copies of the ones that were submitted.

The Court: What became of the originals? Did he testify?

Mr. Tietz: No; that he gave them to Mr. Freedman. Yes, sir. But what eventually became of them he does not know.

The Court: If that is the state of the record, of course, that is apropos the admissibility of them. But if that is the state of the record, who can say that Mr. Freedman did not use them or did not consider them? [35]

Mr. Tietz: My argument is that they should have put in the file for the use of the appeal board.

The Court: The evidence will be reopened on the motion of the defendant and the objection to receipt in evidence of Exhibits A and B for identification will be overruled and the exhibits will be received into evidence.

Is there any further evidence to be offered now?

Mr. Tietz: None.

Mr. Real: Not on the part of the Government.

The Court: The evidence is again closed. Anything further?

Mr. Real: Nothing further, your Honor, from the Government.

The Court: I would like to read this file carefuly, gentlemen, looking toward the question of whether or not there appears to be a basis in fact for such a drastic change in the classification.

Mr. Tietz: If I may have a minute, your Honor, I can bring something to the court's attention that may be of some aid in why the refusal of the defendant to return that Form 150 that was sent him on that date.

Mr. Real: Your Honor, we will object to that.

The Court: As I view that, Mr. Tietz, it is this: That revised form was merely a privilege offered to this registrant. If he did not choose to take advantage of it he [36] was not required to do so. If he were content to stand upon the record as it then was, he was entitled to do it, as I view it.

Mr. Tietz: I have just about a 30-second statement of fact that may help the court.

The Court: Is it in the record?

Mr. Tietz: In that sense that you have the old form and you have the new form it is in the record.

(Argument omitted.)

The Court: Is there any objection to continuing this case until March 19th at 10:00 o'clock?

Mr. Tietz: None on the part of the defendant.

Mr. Real: None from the Government, your Honor.

The Court: Very well. I will continue it for further oral argument until that time. In the meantime I would like to read the file.

You are excused at this time, Mr. Affeldt, and instructed to return to this courtroom on Thursday morning, March 19th next, at 10:00 o'clock.

(Whereupon a recess was taken until 10:00 o'clock a.m., Thursday, March 19, 1953.) [37]

Thursday, March 19, 1953, 10:00 A.M.

The Court: No. 22,595, United States vs. Affeldt.

Mr. Tietz: Ready for the defendant.

Mr. Real: Ready for the Government, your Honor. The defendant is present.

The Court: What is the present status of this case?

Mr. Real: My recollection of it is, your Honor, it is really here for argument on the submitted motion for judgment of acquittal.

The Court: Do you agree that that is the present status of the affeldt case?

Mr. Tietz: Yes, your Honor.

The Court: While I have it in mind, Mr. Tietz, I shall expect the Government to have in court at all times all applicable regulations in these cases. I find that my copies are not always up to the minute.

Mr. Real: Yes, your Honor.

The Court: Here this defendant was classified I-A after having been classified a I-O.

Mr. Tietz: And III-A, too, your Honor.

The Court: Yes, I have in mind that dependency question. I am just referring now to the conscientious objector claim. Do you wish to argue this matter?

(Argument omitted from transcript.) [38]

The Court: It is after 12:00 now. Perhaps we had better take this up again at 1:30. Is that agreeable?

Mr. Tietz: Yes, sir.

The Court: Very well. The defendant will return at 1:30 this afternoon.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day.) [39]

Thursday, March 19, 1953, 1:30 P.M.

The Court: In the case on trial, No. 22595, United States vs. Affeldt, is it stipulated, gentlemen, that the defendant is present?

Mr. Tietz: So stipulated.

Mr. Real: So stipulated, your Honor.

The Court: Any further argument on behalf of the defendant?

Mr. Tietz: Yes, your Honor. Before proceeding with the argument I have a request to make.

The defendant is apprehensive that in his testimony he did not bring out a point that would bring him within one of the FBI points, although perhaps not the Nugent point. I would therefore like permission to open the evidence for a few minutes to question him on that one point.

The Court: Is there objection?

Mr. Real: No objection, your Honor.

The Court: Motion granted.

CHARLES WILLIAM AFFELDT, JR.
(Recalled)

Further Direct Examination

By Mr. Tietz:

Q. Mr. Affeldt, I am directing your attention to the occasion you were before the hearing officer of the Department of Justice. Did you have any conversation with him with [40] respect to the FBI investigative report? A. Yes, I did.

Q. What was it?

A. Well, near the close of the hearing he asked me why I brought along a fellow, Mr. Bill Dragle, and I replied that he knew me, knew I was one of God's witnesses, he knew I was a minister and knew my character. So I brought him along so that he could refute anything they might have against me relating to my character, my beliefs, and my ministerial activities.

Q. When you say "against you," did you have reference to mimeographed copies that he sent you that he would advise you of any adverse information? A. Yes, I did.

The Court: Are you referring to Exhibit 2 in evidence here?

The Witness: Yes, instructions, the instructions contained with the notice to report for the hearing.

Q. (By Mr. Tietz): Did he show you the FBI report? A. No, he did not.

Q. Did he inform you that some of the informants in the FBI investigative report had, as is

(Testimony of Charles William Affeldt, Jr.)
stated on page 71 of Exhibit A, that being the letter the special assistant of the Attorney General sent to the appeal board, that several of the persons, however, had never heard registrant discuss [41] his religious beliefs or opposition to military service?

A. No, he didn't. At the time I asked him about that, he said he had nothing against my character, as far as my former employees and all my associates had testified that my character was above reproach.

Mr. Tietz: You may cross-examine.

The Court: Did you consider it against your character the statement that you had not discussed your religious beliefs with everyone?

The Witness: I would not consider it against my character, no. But the appeal board might consider that as evidence of not being sincere.

The Court: The Attorney General's letter, page 71, letter to the appeal board, states that:

> "acquaintances, former employees and associates, all describe registrant as sincere in his religious beliefs and state that his character and reputation are above reproach."

Any cross-examination?

Mr. Real: No cross-examination, your Honor.

The Court: You may step down.

Mr. Tietz: That is all. In connection with that, your Honor, I forget whether or not we asked that the investigative report be admitted in evidence. Does the Government have any recollection on that? We had some stipulation. [42]

Mr. Real: Yes, it was asked and the Government's objection was sustained in that connection, your Honor.

The Court: The investigative report—there were several reports, four of them exactly—Defendant's Exhibits C, D, E, and F for identification are now in custody of the clerk, under seal, and were examined in camera by the court and objection to their offer in evidence was sustained.

Mr. Tietz: And counsel is refused permission to go over these reports; is that contained in the ruling of the court?

The Court: Yes. The court ordered them sealed and thus withheld from the defendant and his counsel, upon the ground that the public policy favoring the preservation of the confidential character of executive documents such as these outweighs any possible evidentiary value to the defense of the documents in question. And, of course, the reports will be available in the event appeal be taken, to be included, under seal, in any record on appeal, so that the Appellate Court may examine them and make such ruling as it deems proper.

Mr. Tietz: There are so many cases we have been trying consecutively I was not certain that I had protected the record on that point.

Now, your Honor, I would like to go on with my argument for a motion for judgment of acquittal. [43]

Mr. Real: Your Honor, I do not want to interrupt Mr. Tietz, but may we close the evidence before we go on?

Mr. Tietz: Yes. I am sorry. We rest.

Mr. Real: The government rests.

The Court: Very well. You renew your motion for judgment of acquittal upon the grounds heretofore stated?

Mr. Tietz: All stated, and then the new ones that I wish to go on with now. The first new one is that the Attorney General, as is shown by page 71 of Exhibit 1, in his letter of recommendation to the Appeal Board shows a misconception of the law.

The Court: Before you proceed.

(Discussion of proceedings in Sterrett case omitted from transcript.)

Mr. Tietz: On page 71 it is quite evident that the Attorney General is under misapprehension concerning the Act and the regulations and the definition of a conscientious objector. The Attorney General is under the rather prevelant misconception that in order for an individual to be a conscientious objector he must also be a pacifist.

(Argument omitted from transcript.)

The testimony of the defendant, both the other day and today, goes to show certain things that I assert was denial of due process. On page 59 we see the summary of the personal appearance hearing, and I am going to argue that this summary [44] does not contain a true summary of what took place; that it left out essential things, and therefore the appeal board did not have before it things

which might have made it different, particularly on his claim for being a minister entitled to IV-D classification. That his testimony was that when it says in the summary that "he admitted," or whatever it says there, about not being ordained, that is incorrect. He told them he was ordained. That is one point.

Now, the second point is that he gave them the explanation that he was a regular minister, which the summary does not contain.

(Argument omitted.)

Now I want to go on to the next point and that is what occurred at the hearing officer's hearing. I submit there are sufficient irregularities there to justify the conclusion that there was a denial of due process.

First, that the hearing officer also refused to accept evidence of the differences between a pacifist and the J. W. type of conscientious objector, and when the defendant attempted to go into that, according to his testimony, he was told by the hearing officer that he had 20 other clients to see that day and he could not give him any more time. He wanted only yes or no answers. I believe that was the expression used by the witness.

Further, that the hearing officer failed to transmit to [45] the Attorney General for the consideration of the appeal board the two affidavits that were submitted by the registrant and which I believe contained some information that was not in the file.

The Court: Was it admitted that the hearing officer took the affidavits, even though they are not in the file?

Mr. Tietz: The defendant states to me that he did take them. He said he testified to that. I don't remember the testimony.

The Court: Yes, that is my recollection of the defendant's testimony. So the only objection, I take it, is that they are not in that file.

Mr. Tietz: Yes, that the Attorney General and the Appeal Board did not have them before them when they considered the matter.

The Court: Does the Government wish to be heard?

Mr. Real: Not unless your Honor has some particular things. Your Honor has heard the argument of the Government in this case. I think there are no new points raised in this particular case.

The Court: I have already indicated my views as to the point made with respect to the dependency classification. It is my opinion that the new dependency questionnaire which was submitted to the Local Board in September of 1951, reducing the claimed dependents of the defendant from [46] three to one—in the original questionnaire the defendant had claimed as dependents his mother, his sister, and his father—in the revised questionnaire, the new questionnaire furnished in September, 1951, only the mother is claimed as a dependent.

In my opinion, that furnished sufficient informa-

tion for the board to use as a predicate for the withdrawal of the dependency exemption.

The next point is as to these exhibits A and B which the defendant states he presented to the hearing officer and the hearing officer declined to put them in the file. Of course, insofar as the exhibits deal with the claims of defendant for the classification of IV-D as a minister, that issue is not before the hearing officer, and if that were all that were involved in the exhibits, the hearing officer could have rejected them upon that ground.

However, Exhibits A and B do deal with the conscientious objector claims of the defendant and contain some information relative to his claim. The defendant testified that the hearing officer took the exhibits and presumably considered them, so that the force of the objection is narrowed to the fact that the exhibits are not in the file, the Selective Service File, and consequently not before the appeal board. Section 1621.8 to the regulations provide, in part, that

"Every paper pertaining to the registrant, except his [47] registration card (SSS Form No. 1) and such other papers and documents as may be designated by the Director of Selective Service shall be filed in his Cover Sheet (SSS Form No. 101) until authorization to remove it has been received from the Director of Selective Service."

At the time pertinent here, Section 1626.25(d) provided, in part, that

"The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the

letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

That has since been amended, has it not?

Mr. Tietz: Yes, sir.

The Court: So the report of the hearing officer was not required to be in the file at the applicable time here, is that correct?

Mr. Tietz: That is true.

The Court: There is nothing in the statute or the regulations that I find which requires that these papers, such as these affidavits or exhibits A and B, be considered as presented to the hearing officer are required placed in the file. The Department of Justice is directed by the statute to conduct an inquiry and hearing. The evidence received [48] by the hearing officer at the hearing is not required nor even expressly permitted to be placed in the file. The defendant could have presented this information at his personal appearance under Section 1624.2(d), and if so presented, the information would have been placed in his file pursuant to Section 1621.8, etc., of the regulations.

There is nothing, in short, to prevent a defendant from placing Exhibits A and B in his file if he so desired. In any event, there is nothing in these exhibits which is not already included in the file in substance. In my opinion, its omission, even if erroneous, was not such as to prejudice any right of the defendant. It must be construed as harmless error in effect under the ruling in the Tyrrell v. United States.

The report of the hearing officer is missing from the file, but in view of the amendment of the regulations which the defendant has called to my attention, there is nothing to be made of that fact.

Finally, we come to the more difficult question of whether or not there is a basis in fact for the denial of the conscientious objector claims of the defendant—more correctly, whether there is basis in fact for the classification I-A in which the defendant has been placed.

As the letter of the special assistant to the Attorney General, appearing at pages 71 and 72 of the Selective [49] Service file, Exhibit 1, points out, the defendant on his Special Form for Conscientious Objector, at page 18 of Exhibit 1, in response to question 5, reading:

> "Under what circumstances, if any, do you believe in the use of force?"

has answered:

> "Only in a case of self-defense or for the protection of my dear relatives and brethren in the truth as provided in the Holy Scriptures."

So that statement and other material appearing in the file, in my opinion, gives reasonable basis in fact for the classification I-A.

That conclusion is reached through the further conclusion that the defendant must be "guilty" as charged and is so found.

Is there any occasion to order a presentence investigation?

Mr. Tietz: Your Honor, before we get to that, I might remind your Honor that we raise the question here about jurisdiction. I believe the file and the records in this case will show that there is no proof of jurisdiction. I am sure your Honor forgot that.

The Court: The point there, as I understand it, is that the defendant was registered by the registrar of one board.

Mr. Real: No, your Honor. It is that he failed to sign the registration card. [50]

The Court: Oh, this is the case where he failed to sign the registration card?

Mr. Real: Yes, your Honor.

Mr. Tietz: And there is no further testimony that he ever was a registrant of that board. Remember, this is a case that does not have that stipulation.

The Court: I understand. I recall it now. But he did sign his registration statement, his classification questionnaire. He signed and presented very many matters. He considered himself a registrant of the board.

Mr. Tietz: My argument was, like someone comes into court and attempts to confer jurisdiction on the court.

The Court: Well, he cannot confer it where none exists. But there is no question but what he lives within the jurisdiction of Local Board 81, is there?

Mr. Tietz: Why not? Is there any testimony that he did?

The Court: Well, let's see. He gave us his address. I do not know what the jurisdiction territorially of Local Board 81 is, but if the Government will give the court judicial knowledge, the court will take judicial notice of it.

Mr. Real: Your Honor can take judicial notice that that address is within the jurisdiction of this particular local board, your Honor.

Mr. Tietz: How?

The Court: It is a matter of public record, is it not, [51] what the jurisdiction of the board is?

Mr. Real: Yes, it is, your Honor.

(Further argument omitted from transcript.)

The Court: If the Government is satisfied to stand on it, in my opinion, it is analagous to a venue question. If there is any point to it at all, it is analagous to a venue question, which was waived by the defendant on submitting his classification questionnaire and subsequent matters to Local Board No. 81 and thus submitting himself to be classified by that board.

Is there any occasion to order a presentence investigation in this case?

Mr. Tietz: I should not think so, your Honor.

The Court: The Government?

Mr. Real: None from the Government.

The Court: The court will direct that no presentence investigation or report be made in this case.

Is March 30th at 10:00 o'clock a satisfactory date for sentence?

Mr. Tietz: Yes.

Mr. Real: Satisfactory to the Government.

The Court: Is the defendant at liberty on bail?

Mr. Tietz: Yes, sir.

Mr. Real: He is.

The Court: The court will continue your bail, Mr. Affeldt, [52] pending sentence. And you are instructed to return here on March 30th next at 10:00 o'clock for sentence.

(Whereupon a continuance was taken until 10:00 o'clock a.m., March 30, 1953.) [53]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings, as specified by defendant's counsel, had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of July, 1953.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed July 16, 1953. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 16, inclusive, contain the original Indictment; Waiver of Trial by Jury and of Special Findings of Fact; Judgment and Commitment; Notice of Appeal; Designation of Record on Appeal and two Orders Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for December 22, 1952, and March 12, and 19 and April 7, 1953, which, together with the original exhibits and reporter's transcript of proceedings on March 12, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the fees for certifying and preparing the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of July, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,941. United States Court of Appeals for the Ninth Circuit. Charles William Affeldt, Jr., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13941

CHARLES WILLIAM AFFELDT, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

Reclassification of appellant in Class I-A was arbitrary and without basis in fact.

II.

Reclassification was motivated by and was based on misconceptions of law on the local board level and on the appeal board level.

III.

Appellant was denied due process of law in connection with his personal appearance hearing before the local board, on each of the following grounds:

First: the summary of the hearing was prejudicially incomplete.

Second: the summary shows that the board's decision was made on an illegal basis.

IV.

The Hearing Officer deprived appellant of due process of law in the following particulars each vitiating the usefulness of his report and tainting the further classification action:

First: the said officer based his Advisory Opinion and the Attorney General based his recommendation on illegal bases.

Second: the said officer in his Opinion, used adverse material against appellant, although he had led appellant to believe there was no adverse material.

Third: the said opinion was prejudicially incomplete.

Fourth: he refused to accept evidence from appellant of the difference between the Jehovah witness and the pacifist types of conscientious objectors.

Fifth: he failed to transmit to the local board or to the appeal board two affidavits submitted to him by appellant.

Sixth: he improperly hurried appellant during the hearing.

Seventh: he did not show appellant the FBI investigative reports.

V.

Appellant was never a registrant of the local board that issued the order on which the indictment is based, or a registrant of any local board.

VI.

The failure and refusal to provide appellant with the secret FBI report was a violation of the Act, the Regulations, and the due process clause of the Fifth Amendment.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.

[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.